UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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FRESH DEL MONTE,

Plaintiff,

v. 08 CV 8718 (SHS)

DEL MONTE,

Defendant.

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New York, N.Y.
August 11, 2011
3:40 p.m.

Before:

HON. SIDNEY H. STEIN,

District Judge

APPEARANCES

SKADDEN, ARPS, SLATE, MEAGHER & FLOM
Attorneys for Plaintiff
BY: ANTHONY J. DREYER
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MICHAEL J. BEAM

(In open court)

THE DEPUTY CLERK: Fresh Del Monte v. Del Monte. 08 CV 8718. Counsel, please state your name for the record.

MR. DREYER: Good afternoon, your Honor. For the plaintiff, Anthony Dreyer with the firm of Skadden Arps Slate Meagher & Flom. With me is my partner Lauren Aguiar and our associate Jordan Feirman.

THE COURT: Welcome to all of you.

MR. KELLER: Bruce Keller, your Honor, of Debevoise & Plimpton for Del Monte Corporation. With me is Michael Beam, my colleague, and from Del Monte Corporation Scott Rickman.

THE COURT: Good afternoon to you. Please be seated. This is Fresh Del Monte's motion for summary judgment on the contract claim, and I've read the material, thought about it. I don't think any of us have to debate the legal standard. That doesn't seem to be at issue here. Summary judgment is appropriate only if the evidence shows there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. I can't rely on merely conclusory statements. Summary judgment on a claim for breach of contract is appropriate only when the contractual language on which the moving party's case rests is found to be wholly unambiguous and to convey a definite meaning. That's a quote from *Topps v. Cadbury*, 526 F.3d 63, 68 (2d Cir. 2008). And an ambiguity exists where the terms of the contract can

suggest more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement. I should consider extrinsic evidence only if I first find that the disputed contractual language is ambiguous.

I take it that everybody can adopt those as the basic building blocks of how I am to proceed. Plaintiff?

MR. DREYER: Yes, your Honor.

THE COURT: Defendant?

MR. KELLER: Agreed, your Honor.

THE COURT: All right. So the issue then is rather straightforward. Is the contractual language clear and unambiguous. If yes, plaintiff wins. If no, I go to the extrinsic evidence, and there are affidavits and so forth on extrinsic evidence to see if using extrinsic evidence things become clear. And that's the way I approach this.

Those of you who have been here before know that I try not to hide the ball. And my thinking -- I'll refer to plaintiff as Fresh if that's okay. I don't mean to be fresh. My thinking is that the language is not unambiguous. And the extraneous evidence, when I go to it, is all over the lot. I have to credit one view or the other with the extraneous evidence which ultimately I may be called upon to do. But not here and now. I can't do that here and now.

So, as of now, Fresh, I think you lose. And I try to

always do this in the simplest possible way. I think there is some theory that the simplest answer is usually the correct answer. I forget who said that. But my approach here is pretty basic. And I don't mean to put too heavy a burden on you, sir, but I'm telling you how I see it. You're free to convince me otherwise.

The license agreement. The products are fresh food, fresh vegetables, and fresh produce and shall include, blah, blah, but shall exclude any products which have been heat treated or sterilized for the purpose of rendering such products shelf stable.

That by itself is fairly clear. But then we go down to the refrigeration clause.

In addition, the products shall also include, B, refrigerated pineapple products. And there are certain qualifications. It strikes me as pretty basic that the issue is whether I just ended at shelf stable clause, the products are fresh fruit and exclude any products which are heat treated or sterilized. That seems to exclude the refrigerated pineapple, berries and papaya products. But then it says the products shall include refrigerated pineapple, berries and papaya products. I don't see how you can argue that that's clear. Because it seems to me at the end of the day it may be clear. But I need to figure out what I do with that refrigeration clause vis-a-vis the first clause which I'll call

the shelf stable clause, and it doesn't leap out at me even after looking at all of this.

Fresh is arguing that the refrigeration clause unambiguously gives it the right to use Del Monte marks on refrigerated pineapples, berries and papayas. But, look, shelf stable says but shall exclude. I'm with you, Fresh, if all I had to do was look at the refrigeration clause. In addition, the products include, on an exclusive basis, refrigerated pineapple, berries and papaya. You've won there. But I'm just not faced alone with the refrigeration clause. I've got the shelf stable clause, and lo and behold, the shelf stable clause says but shall exclude any products which have been heat treated or sterilized for the purpose of rendering such products shelf stable. And that's what the products we are talking about are.

Speak to me. Tell me I'm wrong.

MR. DREYER: Let me try and convince your Honor to the contrary.

THE COURT: Sure.

MR. DREYER: There is no dispute that the first paragraph sets forth the basic division between the parties. Fresh products on the one hand, that fall within Fresh Del Monte's rights, and non-fresh products that fall within Del Monte's Corp's rights. That's of course what Judge Rakoff held in 1999.

THE COURT: Right. Rakoff -- that decision is separate from what I'm dealing with now. I don't think I'm bound by that. I don't think it really speaks to this. Go ahead.

MR. DREYER: But, the point is, as your Honor points out, that's not where the agreement ends. The agreement continues, the products in addition shall also include -- now Del Monte Corp wants the Court to believe the grant of rights to refrigerated pineapple products is limited to fresh refrigerated pineapple products. That the grant of right to non-utilized fruits should be limited to fresh non-utilized fruits. And there is no doubt that in the agreement that the parties use the term "fresh" as a limiting term. They use it eight times in the first paragraph. Then they stop. Of course if the parties intended to use the term "fresh" as a limiting term below the line, after the words "in addition the products shall also include," they could have easily had done so. But they didn't. And basic principles of interpretation show when parties use a limiting term in one portion of an agreement and don't use it in another, the clear import of that is they did not intend the rights below the line to be limited to fresh.

THE COURT: Let me make sure I understand that. They did not intend the language below the line to be limited to fresh. In other words, "the products shall also include," in your interpretation, is in addition to fresh?

MR. DREYER: Yes, your Honor, for these very specified and very limited exceptions. These are basic exceptions to -- or special exceptions to the basic division that's set forth in the first paragraph.

THE COURT: What do you ask me to rely on when, to me, the language cuts against what you've just said? You're saying a contractual interpretation maxim that says when you stop using a limiting word it means there is no limitation?

MR. DREYER: Yes. In other words, where the parties use a limiting term in one portion of their agreement, in this case fresh, to limit the rights that Fresh Del Monte has, and elsewhere in the agreement where they articulate a grant of rights and don't use the word fresh, the import of that --

THE COURT: It's not elsewhere in the agreement. Here it is. Pineapple by papaya.

MR. DREYER: Sure. What Del Monte Corp would do is have the Court add the words "fresh" to fresh refrigerated pineapple, fresh non-utilized fruit. That's the point we're making. When the drafters of this agreement intended to limit the grant of rights to fresh products, there is a very easy way to do it. They use the term "fresh." They didn't do that anywhere in subparagraphs A, B or C.

THE COURT: Help me with this. They didn't have to because -- I grant you one way of looking at it is yours. And I remark again I'm not coming to an ultimate conclusion here,

I'm trying to determine whether this thing is unambiguous, enough so that partial summary judgment can be granted to Fresh.

How can you say that it is so clear that the refrigeration clause is in addition to and separate from the exclusion in the first sentence? I know that's what you are trying to address. Go ahead.

MR. DREYER: If I may, your Honor. One is those are the words the parties used. "In addition the products shall also include." So you have a basic division and you have specialized exceptions.

THE COURT: Now we're going back to Rakoff. Doesn't that simply show -- I forget his phrase. It was pretty firm. Rife with inconsistencies, whatever his phrasing was. Isn't that all that does?

MR. DREYER: I think in a summary judgment opinion he said it was riddled with ambiguities. That may be the phrase you're recalling.

THE COURT: I think there were some adjectives there too.

MR. DREYER: In his ultimate decision he backed off from that. But there were certainly ambiguities in the agreement. They were clarified by that decision. The parties do have to live with that decision. What he found and what I think the words clearly convey is there is a basic division in

the first paragraph, as your Honor points out. But, what then follows in addition to that basic division, are special exceptions that don't have to do with the division between fresh and not fresh.

In fact, look at the other things, if I may, your Honor, direct your attention, the other grant of rights below the line after the phrase "in addition the products shall also include." We've got frozen pineapple products. There is no dispute that's a non-fresh product. Not shelf stable. I wouldn't put a frozen pineapple on a shelf. Pineapple concentrate, pineapple purees. These are all non-fresh products. This entire grant are basic separate rights in addition to the division that's set forth in the first paragraph.

That's what they mean and that's why the parties chose the words that they did. That's why they chose the words "in addition," that's why they chose "shall also include."

If Del Monte Corp is right and all paragraph B gives us is the right to sell refrigerated pineapple products that are fresh, we already had that right. We don't need this clause at all. This clause means something else. It is a separate grant over and above for all forms of refrigerated pineapple products without exclusion. Without being limited to fresh. And the same thing is true for the non-utilized fruit grant in subparagraph B.

We also know that, your Honor, because of the definition of surplus fruit. So in paragraph B our right to sell non-utilized fruit, which is defined as papaya, berry, melon and banana, we can only sell those products if we use surplus fruit. And surplus fruit is defined on the next page, your Honor, as fruit that was intended to be sold for sale as fresh fruit, but which has not been sold as fresh fruit.

So the very definition of surplus fruit, which is the only type of fruit we can sell refrigerated, under the non-utilized fruit provision, is not fresh fruit. We can't sell fresh fruit. What Del Monte Corp says is, well, what the parties really meant in the definition of surplus fruit was whole fresh fruit. Fruit that was intended to be sold as whole fresh fruit but was not sold as whole fresh fruit. That's requiring the Court to add terms to the agreement.

Their interpretation requires the Court to strike out the terms "in addition to," and the products shall also include, to strike out the word "also." And to graft the words "fresh" before refrigerated pineapple products and before non-utilized fruit in subparagraph B. You have to alter the agreement.

THE COURT: No, it doesn't. Because in part it depends upon the extent of primacy you give to the first sentence in the shelf stable clause. It doesn't require any excision if you say that the first sentence controls everything

else as it were. That is, the products are fresh fruit but shall exclude any products which have been heat treated or sterilized for the purpose of rendering such products shelf stable.

MR. DREYER: I think, respectfully, your Honor, the interpretation you're advocating, which would have to be found to be a reasonable one for us to continue, would be one in which the general swallows the specific. There is a general division. No doubt about that. But there are specific exceptions, and we know that general division can't trump what follows the "in addition the products shall also include" because then we couldn't sell frozen. They're not fresh. We couldn't sell purees or concentrates. They're not fresh. So respectfully, I think it is on its head. The general doesn't trump the specific. It is the other way around.

I think in this regard the case that you decided, the *Georgia Pacific* case which Del Monte Corp cites, is directly on point. In that case there was a general assumption of all liabilities. General Pacific assumed all liabilities for International Paper. Later on in the agreement there was an exclusion for liabilities that arose after the contract. And of course your Honor held in that case while there was a general assumption, the specific carve-out trumped the general assumption of liabilities. And that's what we have here. We have very narrow specific carve-outs for very specific product

categories that are not fresh and are not tied to the basic division of fresh. That's what the phrase "in addition" means. That's what the phrase "the products shall also include means."

THE COURT: What else did you want to tell me?

MR. DREYER: Okay.

THE COURT: Do you want to go to the extraneous evidence?

MR. DREYER: Well, your Honor, with respect to the extrinsic evidence, I believe you only get there --

THE COURT: I said extraneous. Extrinsic is the right word, go ahead.

MR. DREYER: With respect to the extrinsic evidence you only get there if you adopt Del Monte's Corp --

THE COURT: I understand. Unless there's something else you want to tell me about how to parse this.

MR. DREYER: Again, and the reason for the demonstrative, if I may, your Honor.

THE COURT: Of course.

MR. DREYER: Their interpretation requires the prohibition to be all preserved products. We cannot do any preserved products. Not just heat treated or sterilized products. We're also talking about chemically preserved products. That's one of the products that Del Monte Corp is selling refrigerated. They are saying we can't do any. We'd have to rewrite the very first paragraph. We'd have to ignore

the "in addition" language and the "shall also include" language. We'd have to add limiting terms to paragraph B. That our rights are limited to refrigerated fresh pineapple, refrigerated fresh non-utilized fruit, and we'd have to rewrite the surplus fruit definition to be restricted to fresh fruit that was intended to be sold as whole fresh fruit but was not sold as whole fresh fruit. And we'd have to accept that the general prohibition in the very first paragraph trumps everything that follows, even though the parties chose very careful words to set those off as exceptions.

We submit that is not a reasonable interpretation. It is not one the Court should adopt. Because it does require a rewriting of the agreement. Our interpretation does not. It is based on the four corners of the agreement, nothing more, nothing less.

THE COURT: Thank you. Before you go on to the extrinsic, let me hear from Mr. Keller on the contractual language. Not the extrinsic evidence. He'll hit the extrinsic evidence.

I'm sure you've agreed with everything I've said so far, sir, so let me assure you that the questions are for discussion purposes. So go ahead.

MR. KELLER: The legal maxim that I am most mindful of at this moment is quit while you are ahead. So I'm going to be very specific in responding to Mr. Dreyer's points about the

rewriting.

The first point that he's really making is the above the line, the below the line point, but that's disproven. This is an awful agreement. This is really poorly drafted. The above the line, below the line argument is disproven by the full text of the very first paragraph. Because as you can see from the demonstrative in front of you, notwithstanding an unambiguous grant of fresh fruit, fresh vegetables and fresh produce, it then goes on to say in addition, well, literally it says "the products shall also include other types of fresh fruit and vegetables" so we know --

THE COURT: Wait.

MR. KELLER: The very last sentence of the first paragraph, your Honor.

THE COURT: Okay.

MR. KELLER: The products shall also include, and it has A, B, C, right. Those are all additional fresh products. Completely superfluous if one thinks that the first grant is for all forms of fresh fruit, fresh vegetables and fresh produce. Nonetheless it is there.

THE COURT: Because your point is each of those are talking about fresh products.

MR. KELLER: Correct.

THE COURT: So what you're doing, I take it, is just showing me inherent within this poorly drafted agreement is

surplusage to begin with. Is that your point here?

MR. KELLER: Exactly so. And I think that's the best response to the above the line, below the line argument that Mr. Dreyer started with.

His second point really had to do with the geographic location of the refrigerated fruit clause. And there he points out that B sits between paragraphs A and paragraph C. Paragraph A being a reference to concentrates and purees, something that's not fresh. We agree. And C, being frozen pineapple, something that's not fresh. We agree. But all that shows you, given the ambiguities inherent in this agreement, is that when the parties specifically intended to single out something that wasn't fresh, they knew how to say so, and did so. It doesn't tell you anything about how B itself is supposed to be interpreted.

The next argument that he made had to do with something that's not within the grant language at all. It is the definition of surplus fruit. And he points out that surplus fruit is in either case something that was originally grown for sale as fresh fruit, but which has not been sold as fresh fruit.

The response to that is two fold, your Honor. First, that doesn't tell you anything about how it can be sold. It doesn't say that surplus fruit is in fact fruit that will be sold as something other than fresh. I understand one can read

it that way. But that's not literally what it says.

But the more powerful reason to reject that argument is actually the analysis you applied to *Rosetta Books*. You can't use a subsequent definition to modify the scope of a prior grant unless that definition itself clearly modifies the grant. And it doesn't here. It is a definitional term. It is not a grant term. Another example of the poor drafting that is inherent throughout this entire agreement, short though it may be.

So none of the arguments that he has raised really are without responses. The reason they're such easy responses to point out is it is bad drafting, it is the epitome of bad drafting. But you can't look at the refrigerated fruit clause alone, stare at it, and think about it, without recognizing it is completely unclear given the unequivocal exclusion, and this is where you started, your Honor, with your comments before Mr. Dreyer got to say anything, the unequivocal exclusion of any products that are heat treated or sterilized for the purposes of rendering them shelf stable.

THE COURT: You're right. That's where I started.

MR. KELLER: That is such a broad exclusion. By the way, it is not the limits of the exclusion, your Honor. Because I think the parties themselves agree they are bound by Judge Rakoff's rule of interpretation which is that if it is not clear, the default is the license granted Fresh rights to

fresh, and nothing else, except as specifically and expressly granted. So this exclusion is simply some of the things that are excluded. But under Judge Rakoff's rule, it is not the full scope of the exclusion. So I have to reject the efforts on Mr. Dreyer's part to X it out or say it doesn't deal with the concept of chemically treated products. If it is preserved it's ours, unless there is an express grant to Fresh.

So for all of those reasons, I think that -- I understand the arguments they are making, but they are not without completely reasonable responses. And I have to submit, when you look at the extrinsic evidence, and I know you were going to let them address that first. I think the extrinsic evidence takes you to only one place, which is any effort on their part to now claim rights to sell any type of preserved fruit can't be sustained by all of the objective evidence from the people who had first-hand knowledge, the course of conduct of the parties, the way the businesses were operated at the time --

THE COURT: That's certainly not their position, right?

MR. KELLER: It is not their position now. But when they first sued, your Honor, when they came into court seeking a preliminary injunction, even though they had a breach of contract claim, they didn't make this argument.

THE COURT: I saw that in the papers. All right.

Thank you.

Let's go to extrinsic evidence, sir. Mr. Dreyer.

MR. DREYER: If I may make one rebuttal point before I move on.

THE COURT: Of course.

MR. DREYER: I agree with Mr. Keller the parties knew how to designate when rights were limited to fresh. They chose the word "fresh." It is not as if they suddenly forgot how to use the word fresh after the first paragraph. It's not like the typewriter ran out of the letters f-r-e-s-h.

THE COURT: I got the point.

MR. DREYER: With respect to the extrinsic evidence, your Honor, and we've addressed every single one of the pieces of extrinsic evidence in their brief. A couple of points I wanted to tease out. The witnesses that have so-called first-hand information. Let's look at some of those witnesses they have.

Mr. Haycox who they purport was involved in the negotiations of the agreement. He talks about what the parties intended. The problem with Mr. Haycox is he tried that in '99. He put in a declaration that said I negotiated the license agreement. I negotiated exhibit B. And it came to trial and he was subject to some pretty skilled cross-examination by none other than Judge Rakoff. And he admitted to Judge Rakoff not only did he not negotiate the agreement, he had no role in its

negotiation. Mr. Haycox's testimony on the parties' intent while they were negotiating the agreement, he's completely unqualified to give that testimony, your Honor.

One thing he is qualified to testify to, though, are the products that Del Monte Tropical Fruit was doing before this agreement was entered into, and the products Polypack was doing after this agreement was entered into. You'll recall that Del Monte Topical Fruit was the business division that Polypack bought, and the business that was going to operate under this agreement. At the time this agreement was negotiated, they were selling a preserved refrigerated fruit salad product. In paragraph B we have fruit salad covered.

We also know after he joined Polypack, he headed up a project to sell under the Del Monte mark preserved refrigerated pineapple products. And the product moved out of planning stage into test marketing. And in fact the only reason it didn't launch was customers hated the product when they test marketed it. They didn't like the taste of it. So that's Mr. Haycox.

Mr. Haase, whom they cite, also had no involvement in negotiating the agreement. And his deposition he said he never consulted it, and at most may have peeked at it. Well, you know, as dense as it is, I don't think you can get the meaning of this document by peeking at it. Mr. Haase is not qualified to testify to the parties' intent.

As to Mr. Carbonell, whatever he had in his head about what the agreement meant, there is no evidence he ever communicated that to Polypack, so of course his uncommunicated intent is entirely irrelevant. Those are the people they are relying on.

THE COURT: What you are asking me to do is to judge their credibility at this stage. That's really what you are asking me to do.

MR. DREYER: I think with respect to Mr. Haase and Mr. Haycox their testimony can't be even considered credible or not because they're simply not qualified. With Mr. Carbonell, although Judge Rakoff found him not credible, I am not asking you to do that. I'm simply saying there is no evidence that whatever he had in his head about what this agreement meant was ever communicated to Polypack. And the law is clear, uncommunicated intent during negotiations is not to be considered.

So that deals with their witnesses, your Honor. And that deals with what the parties were doing at the time. Let me briefly address the issue of enforcement of our rights. It simply is not true we've not raised this before. In the '99 lawsuit in our summary judgment papers we plainly stated that we believed that as part of exhibit B, Fresh Del Monte had the right to do non-fresh products. This is not something we're stating for the first time in this case. While it's true we

could have been more vigilant in our rights, paragraph 10.3 states the failure of a party to assert a right under the agreement does not mean they waived or lost that right. We set that forth in the moving papers. We cited cases dealing with similar provisions that have upheld that provision. Del Monte Corp never challenged that at all in their opposition brief.

There is a very important reason why clauses like that are necessary. This is a perpetual royalty free agreement. While the parties do some business together, they are not in close business contact with each other. They have to live with this agreement --

THE COURT: They're in close legal contact with each other.

MR. DREYER: Imagine what it would be without the non-waiver clause. I understand a lawsuit once every 10 years seems like a lot. If they had to challenge every perceived violation and bring a lawsuit, we would be here much more frequently than once a decade.

The point of that provision is that if there is a perceived violation, the party doesn't have to do anything about it until it becomes a problem. At that point they can assert the right and they haven't waived it, and that's what happened here.

THE COURT: Thank you.

MR. KELLER: Your Honor, just two or three quick

points. First, if I could ask you to look at one piece of extrinsic evidence while you're considering what finally to do, it would be exhibit 29 to my declaration. Dr. Carbonell's letter. It is very clear what his view of exhibit B is all about.

THE COURT: Just a moment. Yes, sir.

MR. KELLER: So, in exhibit 29, Dr. Carbonell -- this is just a couple of weeks a months or so before the execution of exhibit B on the page that's Bate stamped SS 0000083. Under paragraph 7, other.

THE COURT: Yes.

MR. KELLER: Says very clearly what the concept of paragraph B was all about. How to sell what he termed there to be residual fruit, came up in exhibit B as surplus fruit. And the reason I direct your attention to that and you can see what we said about it in our papers and look for it, because it speaks for itself, is that that exhibit fits perfectly with the reason that we put in the Haycox declaration and testimony that was obtained in the deposition excerpts from Mr. Haase. Not so much for the purpose of what the parties intended, although there is some of that there for sure. But to show you how reasonable the interpretation we are urging upon you is.

I agree credibility is key here. You should hear from these witnesses. No question about it. But unlike Fresh's, and I have to say it is an after-the-fact interpretation, like

that interpretation, ours fits together perfectly like a jigsaw puzzle. It all works. The starting point of what was intended was that paragraph in exhibit 29.

As for being vigilant about their rights and what they thought their rights really were, everyone can read the 1999 decision for what it was and what Fresh said at the time. But they did not say, the way that Mr. Dreyer just said it, that they had rights to preserved products. What they carefully said was they have rights to sell fruits that are processed to some extent. We agree. Judge Rakoff held. But processed to some extent never meant preserved. It meant the types of things that are right in the middle of paragraph B there. Coring, peeling --

THE COURT: He was focusing on cutting, right.

MR. KELLER: Cutting was specifically before Judge Rakoff there. It is a question that I have as to why paragraph B didn't resolve that issue for Judge Rakoff. He went in a different direction. I think in part because the parties for whatever reasons wanted to do a little bit more with the exhibit B. But the fact that processing in the form of cutting, peeling, or as exhibit B, paragraph B says right in front of you, making fruit salad, those are the sorts of processing things that were really being argued about by Fresh in 1999.

That takes me to the last point of extrinsic evidence,

which is the fruit salad that they sell. The preserved fruit salad that they sell under the Rosy brand. Now, Judge, they would not create a brand that has no marketplace popularity, no good will, for the purpose of selling a preserved fruit salad unless they thought they couldn't use the Del Monte mark on it. That piece of evidence in and of itself shows what they thought until now.

THE COURT: I'm not sure. I'm not sure how far you can carry that piece of evidence. Your argument is because they are doing this under another brand name is proof that they knew they couldn't do it under this contract, under utilizing a very valuable brand name. That's what you're arguing.

MR. KELLER: That is my argument.

THE COURT: That doesn't get you very far.

MR. KELLER: It is a brick in the wall.

THE COURT: I accept that.

MR. KELLER: Thank you.

THE COURT: Thank you. Let me step off the bench and everybody should take like a 10 minute break if that's okay and come back, and I'll try to have something for you. All right. 10 minutes. Thank you.

(Recess)

(In open court)

THE COURT: I went over in my mind the arguments that were made. Obviously I was doing it as the discussion was

taking place and I thought about this in advance. And I'm going to maintain the position that I started with and deny Fresh's motion for partial summary judgment.

The fact of the matter is, the contractual language is simply not unambiguous. I end where I started. Shelf stable clause, the products are fresh fruit, the products are fresh, but shall exclude any products which have been heat treated or sterilized for the purpose of rendering such product shelf stable. Then they say in the refrigeration clause, in addition the products shall also include on an exclusive basis refrigerated pineapple products.

There is an inconsistency or at least there is an ambiguity there which I just need fleshed out in a trial. The extrinsic evidence is not all one way or the other. I just need a better sense of this. It is not unambiguous and I'm denying the motion on that basis.

All right. Where do we stand? All discovery is over. Expert discovery is over. Fact discovery. I don't have a final pretrial order. Do I? I don't see one.

MS. AGUIAR: You do not, your Honor, no.

THE COURT: Let's set a timetable for that, for the submission of a pretrial order and for a trial date. Do the parties want to talk amongst yourselves now to establish something? I like to do what the parties want. Or have you already done that?

MS. AGUIAR: We've done that to some extent, your Honor. And I think where we came out based on the trial schedules of the counsel involved, with some consultation with the client, that in terms of the trial date, and Mr. Keller will correct me if I'm wrong, in terms of the length of the trial just for your own scheduling purposes looking at your calendar we were thinking of something between seven and nine days.

Is that fair?

MR. KELLER: Yes.

MS. AGUIAR: And in terms of when we would be looking to get on your calendar, sometime --

THE COURT: As I said, I could try it whenever you want.

MS. AGUIAR: We were looking at maybe early February. And the reason for that is there are a number of trials that both counsel have going through the end of the year.

THE COURT: That's true for me too. But as I say, I can try it whenever you want. Let's take a look. Does anybody have a 2012 calendar? Off the record.

(Discussion off the record)

THE COURT: I'm setting the trial date as February 13. Obviously if that's a holiday we'll just move it one day. 9:30 a.m. I'll set aside two weeks. Do we have a jury here?

MS. AGUIAR: Yes, we do, your Honor. And just to go

back and close out, it looks like for some reason on my calendar Lincoln's birthday is listed as the 12th which is a Sunday, so if that means that Monday is an official court holiday maybe we should start on Tuesday.

THE COURT: I don't know if it is or not. Let's set it down for the 13th. If it is a court holiday I'll move it one day.

MS. AGUIAR: Great.

THE COURT: In my own calendar I'll set aside two weeks, jury trial. Let's have by the second week in January, what is the second Monday in January?

MS. AGUIAR: The 9th, your Honor.

THE COURT: January 9, joint pretrial order. Any motions in limine.

MS. AGUIAR: I apologize. I was trying to consult with Mr. Keller. We had discussed this this morning, and of course only if it was acceptable to you, that with regard to the joint pretrial order and motions in limine, since we know where we stand largely with the case right now, we might submit them earlier than that.

THE COURT: Better for me. You tell me. I'll take them as soon as you're ready for them.

MS. AGUIAR: So would it be preferrable for you if we set those dates right now or we consulted with each other?

THE COURT: You can consult with each other. What I

want is on one day, I want the joint pretrial order, any motions in limine, proposed jury charges, and if you wish, voir dire. Voir dire is entirely up to you. I do my own voir dire. If you can give me any questions you want and then I decide whether or not to give them. But the others I want. And then one week later responses to the motions in limine. Unless you think they're going to be extensive motions in limine, then I have two suggestions. One, don't make them. Or two, give yourselves 10 days or two weeks to respond.

MS. AGUIAR: The motions in limine may concern each other's experts and possible issues like that, so I think 10 days might be more in line. But --

THE COURT: I leave that scheduling up to you. The sooner the better. October is probably good for me. But whenever you get it to me you'll get it to me. I'll handle it. Anything else?

MS. AGUIAR: No, your Honor. Your rules mention a pretrial memo if the parties think it is useful, and we did discuss it this morning and don't think it's necessary.

THE COURT: I'm comfortable I understand the issues here. It is really up to you. I don't need it. Anything else?

MS. AGUIAR: Not from us.

MR. KELLER: No, your Honor.

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